Supreme Court, U. S.
FILED
OCT 30 1980
MICHAEL RODAK, JR., CLERK

NO. 80-398

in the

Supreme Court

of the

United States

OCTOBER TERM, 1980

PETER PIAMBINO, et al.,

Petitioners,

vs.

WILLIAM E. BAILEY, et al.
and DAVID SYLVA,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PITTO and UBHAUS
A Professional Corporation
Two North Second Street
Suite 1300
San Jose, CA 95113
Telephone: (408) 287-9001
Frank R. Ubhaus,
Counsel of Recond for
Respondents Bestline Products, Inc., Bestline Corporation, Jerry G. Brassfield, Ralph Flynn, Oliver P. Colvin, James K. Hisler, Marvin Sternberg, Norman Miller, Richard Dumont, Jerry J. Weiss, David Soto, and Willie Larkin.

October 23, 1980

QUESTIONS PRESENTED

1. Whether the court below erred in its finding that the summary judgment on the issue of whether the Bestline distributorships were securities for purposes of federal securities laws was improper.

2. Whether the court below erred in its findings that for private lawsuits the Securities Exchange Act does not constitute an "expressly authorized" exception to 28 U.S.C. §2283, and that the 42 U.S.C. §1983 exception to 28 U.S.C. §2283 is not available for the protection of property rights.

LIST OF PARTIES

The following listed persons were parties in the proceedings below:

NAME	INTEREST
Peter Piambino	Plaintiff
Joseph F. Kucklick	Plaintiff
Marilyn Koslen	Plaintiff
Robert M. Ernst	Plaintiff
Michael J. Gardner	Plaintiff
James D. Small	Plaintiff
All persons who purchased or invested in Director Distributorships during the period from March 7, 1970 through August 10, 1973	Members of the Plaintiff Class
Bestline Products, Inc.	Defendant
Bestline Corporation	Defendant
William E. Bailey	Defendant
David L. Eastis	Defendant
Jerry G. Brassfield	Defendant
Robert Depew	Defendant
Leo Diel	Defendant
Charles Simmons	Defendant
Larry D. Huff	Defendant
Larry S. Huff	Defendant
James Rohn	Defendant
Towru Ikeda	Defendant
Steve C. Stern	Defendant
James K. Hisler	Defendant
Ralph Flynn	Defendant
Martin Day	Defendant

Norman Miller	Defendant
Joseph Cotroneo	Defendant
Richard Dumont	Defendant
Saul Tave	Defendant
Richard Lub	Defendant
Jerry J. Weiss	Defendant
Davis Soto	Defendant
Keith Fox	Defendant
Oliver P. Colvin	Defendant
Tink Anderson	Defendant
Frank Brendis	Defendant
David T. Gibson	Defendant
Gordon Blaum	Defendant
Edna Blaum	Defendant
Richard Grillo	Defendant
Melvin Moran	Defendant
Richard G. Kruse	Defendant
Blair R. Egli	Defendant
Neal Morehart	Defendant
Peter Eiselstein	Defendant
Bert Hardcastle	Defendant
Alfred G. Moravec	Defendant
Kenneth Davis	Defendant
Norman Evans	Defendant
Carroll Gentry	Defendant
Robert E. Johnson	Defendant
Robert L. Shell	Defendant
C.D. St. Peter	Defendant
James Herbert	Defendant
Donald Omholt	Defendant
Sten Tallarida	Defendant
Willie Larkin	Defendant
Frank Conti	Defendant
Andi Dias	Defendant

Marvin Sternberg	Defendant
E.J. Beckman	Defendant
Kenneth Lutz	Defendant
Edward Buck	Defendant
John Wolfe	Defendant
Robert Schuster	Defendant
Robert Richards	Defendant
William Gelfound	Defendant
Lennart Osterman	Defendant
Jan B. Bailey	Defendant
Janin, Morgan & Brenner, a partnership	Defendant
Janin, Morgan & Brenner, a corporation	Defendant
Frank Interdonato	Defendant
George Wunch	Defendant
Robert Burke	Defendant
Wisconsin Attorney General's Office	
New Jersey Attorney General's Office	
Pennsylvania Attorney General's Office	California Restitutionary Program
Missouri Attorney General's Office	
Texas Attorney General's Office	
California Attorney General's Office	
New York Department of Consumer Affairs	
David R. Sylva	Intervenor
Bank of America, N.T. & S.A.	Trustee, California Restitutionary Program

All persons eligible for distributions from the California Restitutionary Program	California Restitutionary Program
Securities & Exchange Commission	Amicus curiae

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

1. The Decision Below Does Not Conflict With the Decision of the Court of Appeals and of the Supreme Court as to the Definition of a Security 5

2. The Decision Below is Consistent With the Decisions of Other Courts of Appeals and of the Supreme Court as to the "Expressly Authorized" Exception to the Anti-Injunction Act 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: **Page**

Cameron v. Outdoor Resorts of America, Inc.,
608 F.2d 187 (5th Cir. 1979) 11

Davis v. United States,
417 U.S. 333 (1973) 14

Del Luz Ranchos Inv. v. Coldwell Banker and Co.,
608 F.2d 1297 (9th Cir. 1979) 9, 10, 11

In Re Bestline Products Securities,
412 F.Supp. 732 (S.D.Fla. 1976) 2,

Int'l Brotherhood of Teamsters v. Daniel,
439 U.S. 551 (1979) 9, 10, 11

Lynch v. Household Finance Corp. et. al.,
405 U.S. 538 (1972), *reh. denied* 406 U.S. 911 14

Piambino v. Bailey,
610 F.2d 1306 (5th Cir. 1980) 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14

SEC v. Glenn W. Turner Ent., Inc.,
474 F.2d 476 (9th Cir. 1973), *cert. denied*
414 U.S. 821 (1973) 8, 9, 10, 11

SEC v. Koscot Interplanetary, Inc.,
497 F.2d 473 (5th Cir. 1974) 8

SEC v. W.J. Howey Co.,
328 U.S. 293 (1946) 7, 8, 9, 11

No. 80-398

in the

Supreme Court of the United States

OCTOBER TERM, 1980

PETER PIAMBINO, et al.,
Petitioners,

vs.

WILLIAM E. BAILEY, et al.
and DAVID SYLVA,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Respondents, William E. Bailey, et al., respectfully request that this Court deny Petitioners' Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 23, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida, James Lawrence King, Jr., J., is printed in Petitioners' Appendix D and is reported at 412 F.Supp. 732. The order of the same court as to the injunction and other appealed issues is printed in Respondent Sylva's Appendix II. The opinion of the United States Court of Appeals for the Fifth Circuit, which reversed the judgment and order of the District Court, is printed in Petitioners' Appendix E and is reported at 610 F.2d 1306.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 6, 1980. Petitions for rehearing and rehearing en banc were denied on June 5, 1980. The petition for a writ of certiorari was not filed until September 12, 1980, ninety-nine (99) days after the latter date. This Court is therefore without jurisdiction inasmuch as the petition was not filed within the sixty (60) day requirement set forth in Rule 20 of the Rules of the Supreme Court.

STATEMENT OF THE CASE

Respondents do not have substantial disagreement with Petitioners' and Respondent Sylva's Statements of the Case and thus their respective Statements are adopted by Respondents for purposes of this Brief in Opposition to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

INTRODUCTION

In reversing the judgment of the District Court for the Southern District of Florida, the Fifth Circuit of the United States Court of Appeals held that: (1) a genuine issue of material fact existed as to whether repurchase direct distributorships sold to the plaintiff class by Bestline were investment contracts within the meaning of Federal Securities Laws; (2) David Sylva, the compliance officer for the California Restitutionary Fund, had a right to intervene in the Florida class action litigation and that his application to intervene was timely; (3) the District Court failed to determine that the proposed settlement of the litigation was fair, adequate and reasonable as to each of the two categories of plaintiffs within the plaintiff class; and (5) the entry of an injunction against enforcement of the California state judgment was improper as a violation of the Anti-Injunction Act (28 U.S.C. §2283).

The Petition for Writ of Certiorari herein addressed itself to only two questions: 1) Whether the distributorships sold to the plaintiff class by Bestline were investment contracts within the meaning of Federal Securities Law; and (2) Whether the entry of an injunction against enforcement of the California state judgment was improper as a violation of the Anti-Injunction Act (28 U.S.C. §2283). Thus, Petitioners do not seek review of, nor apparently do they contest, the Fifth Circuit's determination that the Compliance Officer of the California Restitutionary Plan was entitled to intervene in the class action; that the District Court erred in failing to assess the reasonableness of the attorney's fees portion

of the proposed settlement; and that the District Court erred in failing to determine the reasonableness of the overall settlement as it affected the two distinct categories of plaintiffs within the plaintiff class. Accordingly, these issues will not be dealt with herein.

ARGUMENT

1. The Decision Below Does Not Conflict With the Decisions of the Courts of Appeals and of the Supreme Court as to the Definition of a Security.

In support of the Petition for Writ of Certiorari, Petitioners contend that the definition of a security as set forth in the Fifth Circuit opinion constricts and is thus at variance with the definition of a security as adopted by this Court and by various courts of appeals. Petitioners urge that a proper application of the test focuses on quality of the efforts to be performed by the promoters,[1] (p.p.i.) and that the Fifth Circuit misapplied the law by emphasizing the quantity of work expected to be performed by the investors. Petitioners contend that such focal point is inconsistent with other courts of appeals and this Court's applications of the law. Petitioners' argument fails for two basic reasons:

(1) Petitioners have misconstrued and misinterpreted the Fifth Circuit's opinion. Careful analysis of the decision below reveals that the Fifth Circuit's holding does not rest solely on the quantity of investors' work. Rather, the Fifth Circuit focuses on both the investors' expectations as to the source of their profits and the degree of the promoters' efforts vis-à-vis the profits. Secondly, Petitioners are incorrect in concluding that the test laid out by other circuits and this Court requires an emphasis solely on the quality of the efforts to be performed by the promoters. Close scrutiny of the significant cases and subsequent courts' applications thereof reveals that the focus of the test is actually on

---

1. All references throughout to Petitioners' Petition for Writ of Certiorari shall be designated as "p.p."

the investors' expectations of the amount of work required to be performed by them in light of the substantiality of the promoters' efforts towards profits for the investors.

Even if this Court holds that the test does not embody an examination of both the investors' and promoters' efforts, the key criterion in the Fifth Circuit's holding is the quality of the promoters' efforts vis-à-vis profits for the investors. The quantity of investors' work is not dispositive to the Fifth Circuit's opinion. Such analysis reveals that Petitioners' contentions are fallacious and without merit and that in fact the Fifth Circuit's application of the test is entirely in accord with this Court's and other circuits' treatments of the issue.

It is essential to keep in mind the stage of the proceedings at which this case is before the Court. The Fifth Circuit reviewed the propriety of the entry of summary judgment against Bestline. Thus the opinion sought to determine whether there was in fact a genuine issue as to any material facts. The Fifth Circuit's analysis involved a discussion of the law of securities, and a perusal of the facts to determine whether there was in fact a genuine issue as to any material facts. The Fifth Circuit's decision is actually a limited one. It made no determination that the Bestline distributorships were or were not securities. In fact, it specifically pointed out that it was not intimating an opinion. 610 F.2d at 1320. Its scrutiny did not go any further than an application of the facts to the law for purposes of a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The twenty-five page decision consists of only four pages devoted to the securities issue. It held that there were inferences from which one could conclude that the Bestline distributorships were not securities and thus

for purposes of summary judgment, since there was a genuine issue as to material facts, summary judgment was inappropriate.

If this Court does not grant certiorari, the entire case is remanded back to the United States District Court for the Southern District of Florida pursuant to the Fifth Circuit opinion. Judge King must make a decision on the merits as to whether or not the Bestline distributorships were securities, as well as render decisions on the remaining issues. Whatever decision Judge King makes on the merits, both sides will still have the option of appeal to the Fifth Circuit and to this Court. A Petition for Certiorari after a decision on the merits would be more ripe than at this point. Thus, Respondents urge this Court to deny Petitioners' Petition.

Even if this Court determines that the case is ripe, an analysis of the cases indicates that the Petitioners' arguments are unpersuasive and their Petition should be denied.

Over the last thirty-five years, the definition of what constitutes an investment contract and hence a security has undergone significant refinement. The present three-part test is the product of numerous courts' decisions at varied levels and it "embodies the essential attributes that run through all of the Court's decisions defining a security". *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 852 (1975).

In *SEC v. W.J. Howey, Co.,* 328 U.S. 293 (1946), this Court set out the now common definition of an investment contract.

> The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. *Id.* at 301.

The test may be broken down into three component parts: (1) the investment, (2) the common enterprise, and (3) the sole efforts.Clearly the aspect most troublesome and which has received the most interpretation has been the latter element.

More than twenty five years after *Howey,* the Ninth Circuit, following the direction of *Tcherepnin v. Knight,* 389 U.S. 322 (1967), disregarded form in place of substance and focused on the "economic reality". In *SEC v. Glenn W. Turner Ent., Inc.,* 474 F.2d (9th Cir. 1973) *cert. denied* 414 U.S. 821 (1973), the Ninth Circuit interpreted the "sole efforts" element to exist where,

> ... the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise. *Id.* at 482.

Thus, after *Turner,* the "sticky" element became one of "crucial efforts". The Ninth Circuit's standard was adopted by the Fifth Circuit in *SEC v. Koscot Interplanetary, Inc.,* 497 V.2d 473 (5th Cir. 1974) to avoid frustration of the purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934.

Since 1974, this Court has on two occasions specifically tackled the definition of an investment contract. In *United Housing Foundation v. Forman et al.,* 421 U.S. 837 (1975) this Court relied on the original "solely" language of the *Howey* test in reversing the Second

Circuit's finding that shares of stock purchased from a nonprofit housing cooperative were securities. This Court acknowledged by a footnote the Ninth Circuit's interpretation of the sole efforts element; however, it failed to specifically apply it. 421 U.S. at 852. Rather, this Court utilized the *Turner* language and the interpretation of profits of *Tcherepnin v. Knight, Supra.*, to scrutinize the "touchstone" of the test, and to acknowledge that the test actually embodies this Court's various decisions dealing with the definition of a security.

Forman is actually based both on the investors' expectations as to the source of their profits and on the quality of the promotors' efforts. Thus, *Forman* uses both *Howey's* "solely" language and *Turner's* "crucial efforts" language. 421 U.S. at 852. It is pedantic and overly simplistic to say that the test focused on either the quality of promoters' efforts or the quantity of investors' efforts. Application of the *Forman* test involves scrutiny of both.

More recently in *Int'l Brotherhood of Teamsters v. Daniel,* 439 U.S. 551 (1979) this Court followed the *Howey* and *Forman* approaches to find that a non-contributory compulsory pension plan did not constitute a security. Despite the greater source of profits from the employer's efforts, the employee in *Daniel* could not collect until he completed what was expected of him; he had to comply with the three year eligibility requirement. Thus, again, it cannot be said that this Court isolated its focus only on the investors' efforts or on the promoters' efforts. Both were scrutinized.

The Fifth Circuit's approach to the facts of this case involved application of this Court's and the Fifth Circuit's tests for the definition of an investment contract. In its analysis and discussion of the securities question, the Court of Appeals preliminarily set out the

development of existing case law along with various Courts' applications thereof. Petitioners do not dispute the Fifth Circuit's assessment of the current state of the law. Petitioners base their Petition on their misconstruction of the Fifth Circuit's conclusions. (p.p. 15, 16, 17).

The particular conclusionary language of the Fifth Circuit is as follows:

> ... different inferences could be drawn from the facts in the record as to whether anticipated profits were to come solely by Bestline's efforts, with no substantial personal effort on the part of the "investor." 610 F.2d at 1319 (Emphasis added.)

Petitioners' misunderstanding of the above underscored language is apparently based on interpreting the language "no substantial personal effort on the part of the 'investor' " as in the alternative to "solely by Bestline's efforts." A more reasonable and grammatical interpretation is that the language following the comma acts as an apposition to the prior clause, explaining the language "solely by Bestline's efforts."

Under such an interpretation it becomes apparent that the Fifth Circuit found facts from which it could be inferred that the investors' profits were not going to be generated solely by Bestline's efforts, without substantial efforts on the investors' part. Such interpretation is entirely consistent with this Court's holdings in *Forman, Tcherepnin* and *Daniel.* In addition, the Fifth Circuit's application is in accord with other circuits' treatments of the issue, and it is factually incorrect for Petitioners to rely on a fictional inconsistency with other circuits.

For example, *Piambino* is in harmony with a very recent Ninth Circuit opinion dealing with summary judgment on a securities issue. In *Del Luz Ranchos Inv. v. Coldwell Banker & Co.,* 608 F.2d 1297 (9th Cir. 1979),

a lower court's summary judgment order finding a land sale contract to be a security was reversed. There, the Ninth Circuit, in applying the tests of *Howey, Forman, Daniel,* and *Turner,* as the Fifth Circuit did, found that for purposes of summary judgment, the inference that the promoter did not provide the essential managerial efforts dictated a reversal. This case is especially important here because the Ninth Circuit found *Del Luz* to be a borderline case. Because it was before the Court on a summary judgment motion, and it was required to view the evidence in the light most favorable to the party against whom the motion was brought, the Ninth Circuit would not overly extend the law of securities. 608 F.2d at 1301.

Petitioners are likewise incorrect in asserting that the opinion below is inconsistent with the Fifth Circuit's holding in *Cameron v. Outdoor Resorts of America, Inc.,* 608 F.2d 187 (5th Cir. 1979) (p.p. 12). There, the Court of Appeals held that the promoters' managerial and promotional efforts were critical in generating profits for the investors, and that the investments constituted securities despite any nominal efforts by the investors. 608 F.2d at 193.

The opinion below applies the same test. In *Piambino,* the Court of Appeals found that it could be inferred that Bestline was not providing the critical managerial and promotional efforts to generate investors' profits, and that the investors knew this. This is entirely consistent with *Cameron.* Undoubtedly Petitioners are encountering some difficulty in reconciling the quoted language of *Cameron* with *Piambino* because the language of *Piambino* quoted in the Petition at p. 12 refers to an examination of the facts. It is not a part of the Court's opinion as to why summary judgment was improper.

The Fifth Circuit's opinion in *Piambino* is consistent with such rules of law.

The inference that Bestline did not provide the essential managerial efforts affecting the investors' profit dictated a reversal of the lower court's holding.

Respondents submit that despite Petitioners' enticing sensationalistic and propagandistic arguments to the contrary, the Court of Appeals' decision does not inject any "uncertainty" into this Court's definition of an investment contract. (p.p. 8) Petitioners are in essence asking this Court to change the definition of a security to include therein the situation where an investor must work to reap the benefits of his investment. Such an extended interpretation would act to engulf previously excluded non-securities into the realm of securities law.

2. The Decision Below is Consistent With the Desisions of Other Courts of Appeals and of the Supreme Court as to the "Expressly Authorized" Exception to the Anti-Injunction Act.

Petitioners urge this Court to grant certiorari based on an alleged conflict between prior holdings of this Court and other Courts of Appeals. However, careful reading of the cases relied upon exposes the illusoriness of Petitioners' arguments in that no such conflict exists.

Petitioners initially note conflict with *SEC v. Wencke,,* 577 F.2d 619 (9th CIr. 1978), *cert. denied* 429 U.S. 964 (1978) (p.p. 19). Petitioners are correct in discerning a contrariety between the Fifth Circuit opinion and *Wencke* inasmuch as they are entirely distinguishable.

In *Wencke,* the Securities and Exchange Commission sued in District Court to enjoin a receivership in Nevada. In upholding the injunction, the Ninth Circuit held that the injunction against the state court action

was within the expressly authorized exception of an injunction issued at the request of the United States of an administrative agency thereof. In fact, the Ninth Circuit rejected Wencke's reliance on *Vendo Company v. Lektro-Vend Corporation,* 433 U.S. 623 (1977), because "there was no Federal involvement in that case." Similarily, the Fifth Circuit's reversal in *Piambino* of the granting of the injunction is consistent with *Wencke* because neither the United States nor an administrative agency thereof requested the issuance of the injunction. The fact that *Piambino* involves the Securities Act does not place this injunction within the expressly authorized exception applicable in *Wencke.*

Likewise, Petitioners' reliance on *Younger v. Harris,* 401 U.S. 37 (1979) is misplaced (p.p. 20). *Younger* was an action brought in federal court to enjoin a state criminal prosecution for violation of a criminal syndicalism act. The injunction was reversed because it violated federal policy prohibiting federal courts from enjoining pending state criminal proceedings except under extraordinary circumstances, where the danger of irreparable injury is great and immediate. 401 U.S. at 46.

This Court specifically stated that the criterion of irreparable injury is relevant only where a criminal prosecution is sought to be enjoined. Petitioners devote a great deal of time sensationalizing the irreparable injury they have allegedly suffered, but while such arguments are dramatic they are totally irrelevant inasmuch as the injunction herein dealt with a civil action. In fact, Justices Harlan and Stewart, in their concurrence, specifically excluded civil proceedings from the *Younger* holding.

> And since all these cases involve state criminal prosecutions, we do not deal with the considerations that should govern a federal court when it is asked to intervene in state civil proceedings ... 401 U.S. at 55 (Stewart, J. and Harlan, J., concurring)

Petitioners have also improperly relied on *Lynch v. Household Finance Corp., et al.,* 405 U.S. 538 (1972), *reh. denied* 406 U.S. 911. In *Lynch,* the appellant brought an action in federal court to enjoin a garnishment by a sheriff under state law. The District Court dismissed her complaint stating that injunctive relief was barred under 28 U.S.C. §2283. This Court reversed and held that the injunction was not barred inasmuch as the prohibition of §2283 applied only to state court proceedings, and this garnishment was without state judicial order. 405 U.S. at 553.

The action sought to be enjoined in *Piambino* likewise involved a private state court proceeding, and thus *Lynch* is not applicable. Thus, Petitioners' arguments that the Fifth Circuit's opinion is inconsistent with opinions of this Court and other circuits is devoid of merit. Petitioners' additional arguments citing alleged inconsistencies with prior Fifth Circuit opinions, even if true, which fact Respondents dispute, does not provide a sufficient basis for granting a Writ of Certiorari. *Davis v. United States,* 417 U.S. 333, 340 (1973) ; see also, STERN and GROSSMAN, SUPREME COURT PRACTICE, p. 275 (5th Ed. 1978).

CONCLUSION

For the foregoing reasons, Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PITTO and UBHAUS
A Professional Corporation
Two North Second Street
Suite 1300
San Jose, CA 95113
Telephone: (408) 287-9001
Frank R. Ubhaus,
Counsel of Record for
Respondents Bestline Products, Inc., Bestline Corporation, Jerry G. Brassfield Ralph Flynn, Oliver P. Colvin, James K. Hisler, Marvin Sternberg, Norman Miller, Richard Dumont, Jerry J. Weiss, David Soto, and Willie Larkin.

October 23, 1980